Supreme Court, U.S.
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No. _____

In The
Supreme Court of the United States

John Trochmann,

Petitioner

v.

County of Musselshell, et al.

On Petition for Writ of Certiorari
To the United States Court of Appeals
for the Ninth Circuit

APPENDIX A

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56 pp

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOHN TROCHMANN, Nos. 99-35404, 99-36681
DC No. CV 96-134RWA

Plaintiff-Appellant,

v. MEMORANDUM*

COUNTY OF MUSSELSHELL; John Bohlman Musselshell County Attorney, individually and in his official capacity; G. Paul Smith, Musselshell County Sheriff, individually and in his official capacity; Orville Buzz Jones, Musselshell County Sheriff's Deputy, individually and in his official capacity; Dutch Van Syckel, Musselshell County Sheriff's Deputy, individually and in his official capacity; Wanda Spaulding, Musselshell County Sheriff's Deputy, individually and in her official capacity; Woodrow Woody Weitzeil, Musselshell County Sheriff's Deputy, individually and in his official capacity; Department of Public Safety for the City of Roundup and County of Musselshell,

Defendants-Appellees.

* This disposition is inappropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by 9th Cir. R. 36-3.

Appeal from the United States District Court
for the District of Montana
Richard W. Anderson, Magistrate Judge, Presiding

Argued and Submitted February 14, 2001
Seattle, Washington

Before: REINHARDT, WARDLAW, and
GOULD, Circuit Judges

John Trochmann appeals the district court's grant of summary judgment in favor of the County of Musselshell (the "County"), County Attorney John Bohlman and several members of the County Sheriff's Department, and the denial of his request for attorney's fees under 42 U.S.C. [Section] 1988(b). Trochmann argues that the district court erred by: 1) finding the County's sheriff's had probable cause to arrest and detain him; 2) failing to impose sanctions against the appellees' counsel for discovery abuses; 3) refusing to compel disclosure of the identity of a confidential FBI informant who provided information regarding a kidnapping plot; and 4) denying his motion to disqualify the Magistrate who presided over the case. We have jurisdiction pursuant to 28 U.S.C. [Section] 1291 and we affirm. Because the parties are familiar with the factual and procedural history of this case, we do not recount it here except as necessary to explain our disposition.

1. Probable Cause

As the undisputed record reflects, the sheriffs were on a heightened state of

alert based on the FBI informant's tip and the subsequent arrest of two of Trochmann's associates. Trochmann's arrest was preceded by the apprehension of three men who had accompanied him to the sheriff's station -- one of whom entered the station armed. Finally, at the time of his arrest, Trochmann was armed and the passenger of his vehicle, Mark Basque, had apparently reached into his coat for what appeared to be a weapon. Upon reviewing the totality of the circumstances, we affirm the district court's finding that the sheriffs had probable cause to arrest the appellant. *See Easyriders Freedom F.I.G.H.T. v. Hannigan*, 92 F.3d 1486, 1498 (9th Cir. 1996) ("Probable cause exists when, at the time of the arrest, the agents know reasonably trustworthy information sufficient to warrant a prudent person in believing that the accused had committed or was committing an offense."); *Allen v. City of Portland*, 73 F.3d 232, 237 (9th Cir. 1996) (same); *United States v. Valencia*, 24 F.3d 1106, 1108 (9th Cir. 1994) ("[P]robable cause can rest upon the investigating agents' 'collective knowledge.'" (citations omitted)).

II. Discovery Sanctions

The district court did not abuse its discretion by refusing to sanction appellees' counsel for failing to

produce documents pertaining to the state and County's investigation into the charges arising from the events of March 3, 1995.

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See Payne v. Exxon Corp., 121 F.3d 503, 507 (9th Cir. 1997); *Dahl v. City of Huntington Beach*, 84 F.3d 363, 367 (9th Cir. 1996). Because Trochmann did not file a formal request for the information with the Montana Attorney General pursuant to the Montana Criminal Justice Information Act, codified at Mont.Code Ann. [Sections] 44-5-102, et seq., and failed to file a motion in the district court requesting an order to disclose the requested documentation, the district court did not abuse its discretion. Moreover, the documents were produced a sufficient time before trial to avoid sanctions.

III. Discovery Request

Trochmann claims that under Montana Rule of Evidence 502, the appellees could not refuse to disclose the identity of a person who "may be able to give testimony relevant . . . to a fair determination of a material issue on the merits in a civil cause in which a public entity is a party, and the public entity invokes the privilege [against disclosure]." Mont. R.Evid. 502(c)(2). Under this rule, however, the public entity holding the requested information must be a party to the pending litigation. Because the FBI was not a party to this suit, we find that Rule 502 does not apply.

We further note that the appellant failed to make a request of, or file a motion in the district court to compel the FBI to provide the information. Accordingly, we find the district court did not abuse its discretion by refusing to

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compel appellees to disclose the identity of the FBI informant, and we affirm the district court's denial of Trochmann's discovery request. *See Simula, Inc. v. Autoliv, Inc.*, 175 F.3d 716, 726 (9th Cir. 1999); *Garneau v. City of Seattle*, 147 F.3d 802, 812 (9th Cir. 1998).

IV. Recusal

The Magistrate did not abuse his discretion in denying Trochmann's recusal motion brought pursuant to 28 U.S. C. [Section] 455. Trochmann claimed the Magistrate was biased against him, citing instances where the Magistrate had ruled for appellees on several discovery motions. Because "[t]o warrant recusal, judicial bias must stem from an extrajudicial source," *Taylor v. Regents of the Univ. of Cal.*, 993 F.2d 710, 712 (9th Cir. 1992), "and not from conduct or rulings made during the course of the proceeding," *Toth v. Trans World Airlines, Inc.*, 862 f.2d 1381, 1388 (9th Cir. 1998), we affirm the district court's denial of Trochmann's recusal motion.

V. Attorney's Fees

Although Trochmann was a prevailing party and entitled to request attorney's fees pursuant to 42

U.S.C. [Section] 1988(b), the district court retained the sole discretion to award the fees. *Barjon v. Dalton*, 132 F.3d 496, 500 (9th Cir. 1997). The district court did not abuse its discretion by finding that Trochmann's $200 damage award

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was nominal and that attorney's fees were not justified. *See id. at 500; Farrar v. Hobby*, 506 U.S. 103, 114-15 (1992). We, therefore, affirm its denial of Trochmann's request for attorney's fees.

AFFIRMED.

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION

JOHN TROCHMANN, Cause No.
CV 96-134-BLG-RWA

Plaintiff,

vs. ORDER

MUSSELSHELL COUNTY, MUSSELSHELL COUNTY SHERIFF G. PAUL SMITH, individually and in his official capacity, MUSSELSHELL COUNTY SHERIFF'S DEPUTIES ORVILLE BUZZ JONES, DUTCH VAN SYCKEL, WANDA SPAULDING, and WOODROW WEITZEIL, individually and in their official capacities,

Defendants.

Pending before the Court are the motions for summary judgment filed by defendant John Bohlman and the Musselshell County defendants.[i] Having considered the briefs of the parties and the materials on file in the record, the undersigned is prepared to rule.[ii]

(i) In addition to Musselshell County itself, the other county defendants are Sheriff G. Paul Smith and deputies Orville "Buzz" Jones, "Dutch Van Syckel,

Wanda Spalding and Woodrow "Woody" Weitzeil.

(ii) This case has been assigned to the undersigned United States Magistrate Judge for all proceedings, including trial and entry of judgment, pursuant to 28 U.S.C. sec 636 ©, and the written consent of the parties, by order of Chief District Judge Jack D. Shanstrom dated December 9, 1996.

BACKGROUND

In 1995, the Rodney Skurdal cabin located in Musselshell County south of Roundup, Montana, became a gathering site for several Montana freemen. Early that year, local law enforcement officers began receiving threats of bodily harm from the Freemen.

On February 22, 1995, FBI Special Agent Tommie Canady received information from a reliable source that an individual named Jacobi and others planned to "kidnap and lynch a judge in Musselshell County." (Canady Depo. at 25-26.) Canady informed G. Paul Smith, the Sheriff of Musselshell County, of the threat.

Sheriff Smith related Canady's tip to deputies and others, and law enforcment personnel were placed on "heightened security." Smith retained reserve officers, and deputies were assigned on rotating shifts to protect state district court judge Roy Rodegheiro.

At approximately 4:00 p.m. on March 3, 1995, Deputy Orville Buzz Jones responded to a call for assistance at the Musselshell County Courthouse. There, he was informed by Reserve Deputy Mike Thomas that a heavy-set man with

dark hair and glasses had just left the Courthouse. Thomas believed that the individual was affiliated with the Freemen, and that he had been in the courthouse to perform reconnaissance prior to a possible kidnapping. Thomas described the vehicle in which the individual had departed.

Deputy Jones elicited the aid of Sheriff Smith. Smith had previously seen the vehicle described by Thomas parked at the Freeman site. Jones and Smith left in separate vehicles to look for the vehicle.

Jones spotted a white flatbed pickup matching Thomas's description on Main Street. Noticing that it had no license plates, Jones stopped the pickup and identified the driver as Dale Jacobi. Jones arrested Jacobi for having no driver's license, no current registration and no proof of liability insurance.

While conducting a pat-down search, Jones discovered a Smith & Wesson .357 revolver underneath Jacobi's jacket. Jones therefore arrested Jacobi for having a concealed weapon. Jacobi's passenger, Frank Ellena, who possessed a 9mm semi-automatic pistol, was also arrested for carrying a concealed weapon. JOnes discovered a two-way radio in the pickup.

Jacobi and Ellena were booked and incarcerated at the Musselshell County Sheriff's Office. At that time, Deputy "Dutch" Van Syckel was called to assist the investigation. Due to the fact that both individuals were armed, carrying

additional back-up ammunition and in possession of a two-way radio the deputies and the sheriff felt that there could be other vehicles and people involved in the possible attempt to kidnap Judge Rodegheiro. Because of this concern, Sheriff Smith went to assist Reserve Deputy Thomas in escorting the judge home.

A search of Jacobi's flatbed pickup recovered a number of weapons and ammunition, including four SKS assault rifles and two bandoliers containing 380 rounds of SKS ammunition. Also recovered from the vehicle were a bundle of flex-cuffs, a can of pepper spray, a roll of duct tape, approximately $80,000 in cash and gold and silver coins, a video camera and film, and sophisticated radio communication equipment.

Plaintiff John Trochmann, along with Cajun James, Amado Gerry Lopez, and Paul Stramer had arrived at Skurdal's cabin the evening of March 2, 1995. The next day, while in Roundup to eat dinner, Lopez, Stramer and James observed the arrests of Jacobi and Ellena. The three returned to the Skurdal cabin and informed Trochmann of the incident. Trochmann telephoned the sheriff's office to inquire about Jacobi and Ellena. He was told that no one had been arrested. He then called his home in Noxon, Montana, to ask his wife and another relative to contact the Musselshell County Sheriff's office to determined what had happened. The phone calls were placed.

Trochmann, Lopez, Stramer and James

decided to leave Roundup but first Lopez wanted to retrieve a radio that he had loaned to Jacobi earlier in that morning. The four, along with Mark Basque, left in Stramer's truck and Trochmann's car and arrived at the sheriff's office together. The deputies watched the vehicles park at opposite ends of the parking area in what appeared to be an effort to block ingress and egress to the sheriff's office. Trochmann backed his car into his parking space.

There is some dispute as to whether James was riding with Trochmann or with Stramer. In any event,

James, Stramer and Lopez went into the sheriff's office. Lopez was unarmed. Stramer left his pistol in his truck, but kept his holster on. James entered the sheriff's office carrying a .45 semi-automatic pistol in a holster.

Once inside the building, the three men encountered Van Syckel, who was positioned behind a plexiglass window. Lopez asked for his radio and James asked why Jacobi and Ellena had been arrested.

Van Syckel saw Stramer's holster protruding beneath his jacket and said, "I see a gun." Van Syckel then observed James' pistol in his holster and said, "I see another gun."

At that point, Jones, who had been poised behind a door with a shotgun, burst through the doorway. Van Syckel followed him with his handgun drawn. James, Stramer and Lopez were arrested, handcuffed and placed on the floor of the

sheriff's office.

Leaving Deputy Wanda Spaulding to guard the three men, Van Syckel and Jones went to investigate the two men waiting outside in the Trochmann vehicle. The deputies approached the vehicle with weapons drawn. They saw Trochmann talking excitedly on a hand-held portable radio. Alarmed that he was calling for assistance, the deputies felt it was imperative to resolve the situation as quickly as possible. Jones approached the vehicle first, ordering the men out of the car and kicking the right front fender and right front passenger door. Trochmann and Basque did not comply- Jones grabbed at the door handle and attempted to open the door.

Basque began to fumble around, and it appeared to Jones that he might be reaching into his clothing for a weapon. Jones broke the front passenger window with the butt of his rifle, unlocked the door, pulled Basque from the car and placed him on the ground. A loaded 9 mm Smith 6(Wesson pistol was recovered from under Basque's jacket.

Trochmann unlocked his door and slid out of the vehicle to his knees, informing the deputies that he had a firearm and a concealed weapons permit. According to Trochmann, Van Syckel slammed him to the ground and hit him with a boot or a knee across his head, neck and back. A .45 semi-automatic pistol was recovered from the waistband of Trochmann's pants.

Trochmann and Basque were taken into the

Sheriff's office, where they were placed on the floor with the others. Trochmann and Basque were handcuffed with the flex-cuffs that had been seized from Jacobi and Ellena.

Earlier, Musselshell County Attorney John Bohlman had arrived at the Sheriff's office to prepare charge s against Jacobi and Ellena. When the two vehicles pulled into the parking lot, Jones gave Bohlman a gun and Bohlman remained in an interior office. After the five men had been restrained and were lying on the floor, Jones took his handgun back from Bohlman and gave Bohlman the shotgun. Deputy Spaulding and Bohlman were then directed to cover the men while they were searched and escorted to a holding cell.

While lying on the floor, Trochmann contends that someone came over, shouted obscenities at him and dug his boots into his back and head. Trochmann further contends that Jones and Van Syckel then grabbed him by his cuffed hands and jerked him off the ground, tearing at his shoulders and causing extreme pain.

Trochmann and the others were confined in the holding cell for approximately six hours. Trochmann contends that during this time he was forced to remain face down, prone, on the cement floor with his hands cuffed behind his back, while Jones would occasionally enter the cell and kick him in the side.

All but one of the men were transported to the Yellowstone County Detention Facility where they

were detained until the charges against them were eventually dropped.

Plaintiff filed this action alleging various violations of his constitutional rights and state law. The City of Roundup has been granted summary judgment and has been dismissed from the action. The remaining defendants' motions for summary judgment are the subject of the present order.

DISCUSSION

A. Summary Judgment Standards

Summary judgment is appropriate when the pleadings and materials on file "show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), Fed.R.Civ.P. The moving party must initially demonstrate the absence of any dispute over material facts. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). If the moving party adequately carries its burden, the party opposing summary judgment must set forth specific facts showing that there is a genuine issue for trial. Kaiser Cement Corp. v. Fischbach and Moore, Inc., 793 F.2d 1100, 1103 (9th Cir.), cert. denied, 479 U.S. 949 (1986). The court must view the evidence in the light most favorable to the nonmoving party, drawing all inferences in that party's favor. T W Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n, 809 F.2d 626, 631 (9th Cir. 1987).

B. Probable Cause for Arrest

The Civil Right s Act, 42 U.S.C 1983, does not create substantive rights, but "merely provides

remedies for deprivations of rights established elsewhere." City of Oklahoma City v. Tuttle, 471 U.S. 808, 816 (1985). To prevail on a claim under Section 1983, the plaintiff must demonstrate that a person acting under color of state law deprived him of a right, privilege or immunity protected by the Constitution or laws of the United States. Gomez v. Toledo, 446 U.S. 635, 640 (1980)

Plaintiff contends that × he was arrested without probable cause. Although plaintiff's second amended complaint recites a laundry list of violations of his constitutional rights, the Court will interpret his claim as one alleging an infringement of his Fourth Amendment right to be free from unreasonable seizures.

Under the Fourth Amendment, a warrantless arrest is not an unreasonable seizure if it is supported by probable cause to believe that the arrestee has committed or is committing a crime. Allen v. City of Portland, 73 F.3d 232, 236 (9th Cir. 1995) "'Probable cause exists when, at the time of arrest, the agents know reasonably trustworthy information sufficient to warrant a prudent person in believing that the accused had committed or was committing an offense.'" Id. at 237 (quoting United States v. Delgadillo-Velasquez, 856 F.2d 1292, 1296 (9th Cir. 1988)) "'Conclusive evidence of guilt is not necessary to establish probable cause.'" Easyriders Freedom F.I.G.H.T. v. Hanniqan, 92 F.3d 1486, 1498 (9th Cir. 1996) (quoting McKenzie v. Lamb, 738 F.2d 1005, 1008

(9th Cir. 1984)). Rather, courts look to the totality of the circumstances as they appeared to the arresting officers at the time to determine whether probable cause existed. Easvriders, 92 F.3d at 1498.

Here, the uncontroverted evidence establishes that the deputies had probable cause to arrest plaintiff. The sheriff's department had been in a state of heightened security after learning from FBI Agent Canady of a scheme to kidnap and kill a local j udge . With the arrest _of Jacobi : and Ell ena, and the discovery of a cache of weapons along with other items necessary to carry out a kidnapping plot, the threat appeared to be turning into reality. Unders tandably, the deputies were on an even greater sense of alert.

The sheriff's office then began receiving phone calls from individuals inquiring about Jacobi and Ellena. Shortly thereafter, two vehicles with five men drove into the sheriff's office parking lot and parked at opposite ends of the parking area in what reasonably appeared to be an effort to block ingress and egress to the area. In addition, Trochmann backed into his parking place, in what logically appeared to be preparation for a quick get-away.

Then, three men left the vehicles, entered the sheriff 's office, and began making inquires about Jacobi and Ellena. When it appeared that they were carrying guns, and one actually was, Jones and Van Syckel juStifiably arrested them.

After those arrests, Jones and Van Syckel went

to the parking lot with guns drawn to investigate the other vehicle. When they observed Trochmann talking on the radio, they reasonably concluded that he might be calling for assistance.

Although the deputies ordered Trochmann and Basque to exit the vehicle, they did not comply. Though Trochmann disputes that it was possible for Jones to see his pistol, it is undisputed that he had one "cocked and locked" in the waistband of his pants. Finally, when it appeared that Basque was reaching for a gun, Jones broke the frontpassenger window unlocked the door, and placed Basque under arrest. Trochmann then unlocked his door and submitted to arrest as well.

As it appeared to the deputies at the time, there was probable cause to. arrest plaintiff . No reasonable jury could conclude otherwise. Accordingly, all defendants are granted summary judgment on plaintiff's claim that he was arrested without probable cause in violation of the Fourth Amendment.

C. Excessive Use of Force
by Musselshell County Deputies

Plaintiff contends that defendants used excessive force against him on seve ral occasions : first, during the initial arrest; seco nd, while he was taken into the sheriff's office; third, while he was lying in the sheriff's office and was searched and restrained with flex-cuffs; and fourth, while he was in the holding cell. The Musselshell County defendants contend that they are entitled to qualified immunity

on all of plaintiff's excessive use of force claims.

Excessive use of force questions involving warrantless arrests and subsequent detention prior to a probable cause hearing are analyzed under the Fourth Amendment. Pierce v. Multnomah County, 76 F.3d 1032, 1043 (9th Cir.) cert. denied, 117 S.Ct. 506 (1996).) "Under the Fourth Amendment, police may use only such force as is objectively reasonable under the circumstances." Scott v. Heinrich, 39 F.3d 912, 914 (9th Cir. 1994), cert. denied, 515'U.S. 1159 (1995), (citing Graham v. Conner, 490 U.S. 386, 397 (1989)) This objective reasonableness standard is -applied both when reviewing the constitutional claim on its merits and when conducting an inquiry into the defense of qualified immunity. Scott, 39 F.3d at 914.

Footnote: (3) Plaintiff contends that defendants violated his rights under the Eighth Amendment as well. Because the Eighth Amendment proscription against cruel and unusual punishment applies only after conviction and sentence, this claim fails as a matter of law. Pierce, 76 F.3d at 1042.

Summary judgment may be appropriate in excessive use of force cases "if the district court concludes, after resolving all factual disputes in favor of plaintiff, that the officer's use of force was objectively reasonable under the circumstances." Id. at 915. However, "where there is a genuine issue of fact on a substantive issue of qualified immunity, ordinarily the controlling principles of summary judgment and, if there is a jury demand and a material issue of fact, the Seventh

Amendment, require submission to the jury." Thompson v. Mahre, 110 F.3d 716, 719 (9th Cir.), cert. denied, 118 S.Ct. 414 (1997)

Having reviewed the evidence presented by the parties, the Court concludes that questions of material fact preclude summary judgment on the excessive force claims. While the totality of the circumstances may have justified the use of some force in initially arresting plaintiff, the Court will not conclude as a matter of law that the amount of force used was reasonable.

Moreover, material questions of fact exist concerning whether any force was used once plaintiff was restrained. Defendants assert that no force was used. Plaintiff attests to the contrary. While defendants contend that plaintiff's affidavit contradicts his prior deposition testimony and discovery responses, the Court does not find that plaintiff's factual assertions in his affidavit clearly conflict with previous testimony in all respects. Plaintiff's somewhat contradictory answers may be fuel for cross-examination. They are not so clearly conflicting as to be totally disregarded by the Court on summary judgment.

Finally, the Court cannot conclude as a matter of law that forcing plaintiff to lie face down for approximately six hours once he was restrained and in a holding cell was objectively reasonable.

Whether defendants acted in an objectively reasonable manner in arresting, restraining and holding plaintiff is a question that must be left for

trial. Summary judgment is inappropriate.

D. Seizure of Property

Plaintiff alleges that the Musselshell County defendants seized and damaged his personal property. Defendants respond that any seizure was pursuant to a valid search warrant or as an incident to a lawful arrest and therefore lawful. Even assuming this is true, neither side has adequately addressed whether any of plaintiff's property was in fact damaged, and if so, whether any such damage amounted to a deprivation of constitutional rights. Accordingly, defendant's motion for summary judgment as to the seizure of property issue is denied.

E. Conspiracy Claim

In his second amended complaint, plaintiff alleges that defendants conspired to deprive him of his civil rights in violation of 42 U.S.C. Section 1983. [4] Defendants contend that plaintiff has failed to adequately allege the conspiracy claim in his amended pleading and that, even if he has, he has failed to adduce any evidence at the summary judgment stage indicating the existence of a conspiracy.

Arguably, defendants are correct as to both contentions. However, the question is close, especially as it pertains to the events that occurred in the holding cell. viewing the claims in the light most favorable to plaintiff, it may be inferred from the circumstances that the Musselshell County defendants agreed to hold plaintiff in a prone

position, face down and handcuffed, for approximately six hours.

The Court chooses to err, if err it does, on the side of allowing evidence of conspiracy to be presented at trial. The Musselshell County defendants' motion for summary judgment on the conspiracy claims is therefore denied.

Footnote: (4) The Musselshell County defendants posit that plaintiff may be attempting to state a claim of conspiracy to deprive him of his right to equal protection under 42 U.S.C. Section 1985(3) Individuals are protected under Section 1985(3), however, only where racial or other class-based invidious discrimination has occurred. Griffin V. Breckenridqe, 403 U.S. 88, 102-03 (1971). Since plaintiff is not a member of any suspect or quasi-suspect class, he cannot state a[conclusion of footnote 4]claim under Section 985(3) as a matter of law. See Schultz v. Sundberg 759 F.2d 714, 718 (9th Cir. 1985) (Alaska state representatives are not members of a suspect or quasi-suspect class.)

F. Liability of Musselshell County

Under Section 1983, Musselshell County may not be held liable on a theory of respondeat superior. Monell v. Department of Social Servs,, 436 U.S. 658, 690 (1978). To impose liability on Musselshell County, plaintiff must demonstrate that they were harmed by one of the following conditions: (1) a formal policy instituted by County; (2) a longstanding custom or tradition of the

County; (3) a constitutional violation committed by the final policymaker for the County; or (4)

ratification of any employee's unconstitutional actions by the final policymaker for the County. Trevino v. Gates, 99 F.3d 911, 918 (9th Cir. 1996), cert. denied 520 U.S, 1117 (1997)

Plaintiff argues that Sheriff Smith, as the official policymaker for the County, ratified the actions of his deputies. The record on this issue is sparse. Out of an abundance of caution, the Court will not grant summary judgment to the County.

G. Liability of Sheriff Smith

It is uncontroverted that Sheriff Smith was not involved in plaintiff's arrest and initial detention. It is not so clear, however, as to when he returned to the sheriff's office and as to what part, if any, he played in plaintiff's six-hour detention in the holding cell. Therefore, material questions of fact preclude summary judgment as to the sheriff's personal liability under Section 1983 for any actions or decisions he made concerning the manner in which plaintiff was detained in the holding cell.

Plaintiff's claim of negligent hiring is not cognizable under Section 1983, but is rather a state law tort. Even so, defendants have met their burden of proving that Sheriff Smith did not negligently hire deputy Buzz Jones. In his affidavit, Smith attests that he personally conducted a background investigation of Jones which consisted of contacting references and discussing his prior employment with the Billings Police Department with Assistant Chief of Police August Bentz and others. He further attests that an interview team consisting of a

teacher, county commissioner, law enforcement representative and chairman of the Public Safety Commission interviewed Jones before he was hired. The interview team recommended his hiring to Smith.

Plaintiff has submitted no evidence to indicate that Smith knew or had reason to know at the time of hiring that Jones was unfit, incompetent or dangerous . Accordingly, defendants are granted summary judgment on the negligent hiring claim as it pertains to Jones.

H. Liability of Defendant John Bohlman under Section 1983

In an order issued on December 7, 1998, the Court found that defendant John Bohlman was absolutely immune from suit for initiating and prosecuting criminal charges againsr plaintiff. This ruling remains the law of the case and will not be revisited by the Court. The Court reserved the issue of whether Bohlman could be held liable under the Civil Rights Act for assisting law enforcement officers in arresting and incarcerating plaintiff. Bohlman now moves for summary judgment on that issue, claiming that he is entitled to qualified immunity for aiding the defendant deputies.

Footnote: (5) Even if the Court construed his claim as one for malicious prosecution under state law., as plaintiff requests, the outcome would be the same. For the reasons stated in the Court's previous order, the doctrine of prosecutorial immunity serves as a complete defense to a state law claim of malicious prosecution. Ronek v. Gallatin Country, 740 P.2d 1115 (Mont. 1987),

cert. denied, 485 U.S. 962 (1988)

Although the Court concludes that genuine issues of material fact preclude summary judgment against the Musselshell County defendants, it does not reach the same conclusion as to Bohlman's role in plaintiff's arrest. Here, the facts are uncontroverted that Bohlman played no part in the arrest or incarceration of plaintiff. Bohlman's role once he was conscripted by the deputies was simply to guard plaintiff and the four other arrestees with a shotgun while they were searched and while plaintiff and Basque were restrained with flex-cuffs . Thereupon, his function and involvement (other than prosecutorial involvement) ceased. Under the totality of the circumstances, Bohlman's actions were objectively reasonable. No reasonable jury could find otherwise and Bohlman is entitled to summary judgment."

Similarly, the Court finds no issues of material fact on the conspiracy claims as they pertain to Bohlman. As noted above, there is no evidence that Bohlman played any part in plaintiff's arrest and incarceration other than.briefly holding the shotgun, Bohlman shall be granted summary judgment on the plaintiff's conspiracy claims.'

[footnote 6] To the extent plaintiff alleges a state law claim of assault, Bohlman is granted immunity under Section 46-6-402, MCA, for aiding a law enforcement officer in making a lawful arrest. Furthermore, there is no evidence, other than holding the shotgun, of any action which could

conceivably constitute an assault under state or federal law.

Footnote (7) Plaintiff's conspiracy claims are found in the section of the second amended complaint entitled Third Cause of Action. In paragraph 51 of that section, Plaintiff alleges that "Bohlman wrongfully relied upon false statements made by defendants Jones and Van Syckel and the other defendants in preparing groundless charges against the plaintiff, rather than performing an adequate investigation into the warrantless arrest." This claim has already been dismissed on the basis of prosecutorial immunity by the order of December 7, 1998.

I. Defamation

Plaintiff contends that defendants defamed him in several ways. However, he has yet to identify which defendant spoke what defamatory words and to whom. Instead, in paragraph 49 of his affidavit, he simply asserts,

Hundreds of false news reports about the incident were made and included in local , state and national news papers and television reports; the reports declared that John Trochmann was involved in a maniacal freeman plot to kidnap and hang a judge.

In support of this statement, he has submitted an approximately one-inch thick stack of newspaper articles, which he apparently hopes the Court will comb through to find defamatory statements. This the Court will not do.[8]

Footnote (8) Even if the Court chose to peruse the articles for plaintiff, it would be a futile effort, since the newspapers consist of no more than hearsay statements.

Pursuant to Rule 56(f), Fed.R.Civ.P., plaintiff asks the Court to delay issuing a ruling on the

defamation claims until he has had time to conduct more discovery on the issue. This is another thing the Court will not do. Plaintiff has had over a year and one-half to garner facts in support of his claims. Discovery is now closed. Trial is at hand. Plaintiff offers no satisfactory explanation why 'discovery is incomplete. Plaintiff has had adequate opportunity to investigate his case. His Rule 56(f) request is denied.

Plaintiff having failed in his burden of identifying who said what to whom, defendants' motions for summary judgment on the defamation claims are granted.

J. Punitive Damases

The Musselshell County defendants contend that plaintiff cannot obtain punitive damages against either the County or Sheriff Smith. Plaintiff-concedes that Musselshell County cannot be held liable for punitive damages. Accordingly, such claims shall be dismissed. Because material questions of fact exist concerning Smith's personal liability, the punitive damages claims against him remain for further review at trial.

ORDER

In accordance with the foregoing, IT IS ORDERED:

1. The Musselshell County defendants' motion for summary judgment on the issues of probable cause to arrest, Eighth Amendment claims of cruel and unusual punishment, negligent hiring of defendant Jones, defamation and punitive damages

against Musselshell County are granted. The motion is in all other respects denied.

2. Defendant Bohlman' s motion for summary judgment is granted. Defendant Bohlman is hereby dismissed from the action.

Pursuant to Rule 54(b), Fed.R.Civ.P., the Clerk of Court is directed not to enter judgment until all claims between all parties are resolved.

The Clerk of Court shall forthwith notify counsel of record of the making of this order.

Done and dated this 26th day of February, 1999.

/s/Richard W. Anderson

UNITED STATES MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION

JOHN TROCHMANN
Plaintiff,
vs.

MUSSELSHELL COUNTY,
MUSSELSHELL COUNTY SHERIFF,
G. PAUL SMITH, individually
and in his official capacity,
MUSSELSHELL COUNTY SHERIFF'S
DEPUTIES ORVILLE "BUZZ" JONES,
"DUTCH" VAN SYCKEL, WANDA
SPAULDING, and WOODROW
WEITZEIL, individually and in
their official capacities,
Defendants.

Cause No. CV 96-134-BLG-RWA

ORDER

Plaintiff has moved for an attorney's fee award of $73,328.50, which consists of 611.07 hours at $120 an hour. Defendants object to an award of fees in this case.

42 U.S.C Section 1988 provides:

In any action or proceeding to enforce [specified provisions of the federal civil rights laws, including 42 U.S,C. Section 1983], the court, in its discretion, may allow the prevailing party, other than the United States,

a reasonable attorney's fee as part of the costs. . . . .

Having obtained an enforceable judgment in the amount of $200 against defendant Orville "Buzz" Jones, plaintiff is a prevailing party within the meaning of Section 1988, and the Court, in the exercise of its discretion, may award him a reasonable attorney's fee. Farrar v. Hobby, 506 U.S. 103, 111 (1992); Romberg v. Nichols 48 F.3d 453, 455 (9th Cir.), cert. denied, 516 U.S. 943 [1995). Nevertheless, prevailing party status does not automatically entitle plaintiff to an award of fees. Instead, there are some cases where the plaintiff's victory is so technical that he should receive no fee at all. Farrar, 506 at 114-15; Romberg 48 F.3d at 455. This is one.

In determining whether a fee award is appropriate, the Court looks first to the degree of success obtained. Farrar, 506 U.S. at 114; Romberq, 48 F.3d at 455. Success may be measured by the monetary sum awarded by the jury. If only nominal damages are recovered, the only reasonable fee may be no fee at all. Farrar 506 U.S. at 115. In Section 1988 analysis, "'[n]ominal damages' is not limited to an award in the amount of $1, but includes an award that may proper:ly be classified as 'de minimis.'" Morales v. City of San Rafael. 96 F.3d 359, 363 (1996), as modified, 108 F.3d 981 (9th Cir. 1997)

Here, in light of the $2,000,000 in compensatory and punitive damages sought in the final pretrial order, the $200 damages awarded by the jury can

appropriately be considered *de minimis.*[1] *See* Farrar, 506 U.S. at 121 (O'Connor, J., concurring) ("A substantial difference between the judgment recovered and the recovery sought suggests the victory is in fact purely technical.") . Although in closing plaintiff requested damages from the jury in an amount of $1,00, such a strategy is of no help to him. "An attorney cannot avoid Farrar's mandate by waiting until the close of trial and then, when he perceives that his clients have little chance of success, asking for only nominal damages to justify an attorney's fee award." Rombers, 48 F.3d at 455.

Footnote (1) Although there is no record as to how the jury reached its $200 verdict, plaintiff testified that his camera lens became cracked during the arrest sequence and that the value of the camera was $200.

An additional method of measuring success is by viewing the significance of the legal issue on which plaintiff prevailed. Morales, 96 F.3d at 365. Here, plaintiff asserted numerous claims against eight defendants. Thanks to his shotgun approach to pleading, it is difficult to ascertain the exact nature of the claims and, which defendants allegedly committed which wrongs . Nevertheless, the Court has attempted to list the claims as follows.

Defendant Musselshell County:

1. Policy or practice of failing to train resulting in plaintiff's arrest without probable cause

2. Policy or practice of failing to train resulting in

unreasonable searches of plaintiff's property

3. Policy or practice of failing to train resulting in unreasonable seizures of plaintiff's property

4. Policy or practice of failing to train resulting in the excessive use of force against plaintiff

5. Policy or practice of failing to train resulting in violation of plaintiff's right to be informed of the charges against him

6. Policy or practice of failing to train resulting in violation of plaintiff's right to be free from cruel and unusual punishment

7. Policy or practice of failing to train resulting in violation of plaintiff's right to be free from malicious prosecution

8. Policy or practice of failing to train resulting in violation of plaintiff's right to due process

9. Policy or practice of failing to train resulting in defamation of plaintiff

10. Policy or practice of failing to discipline resulting in plaintiff's arrest without probable cause

11. Policy or practice of failing to discipline

resulting in unreasonable searches of plaintiff's property

12. Policy or practice of failing to discipline resulting in unreasonable seizures of plaintiff's property

13. Policy or practice of failing to discipline resulting in the excessive use of force against plaintiff

14. Policy or practice of failing to discipline resulting in violation of plaintiff's right to be informed of the charges against him

15. Policy or practice of failing to discipline resulting in violation of plaintiff's right to be free from cruel and unusual punishment

16. Policy or practice of failing to discipline resulting in violation of plaintiff's right to be free from malicious prosecution

17. Policy or practice of failing to discipline resulting in violation of plaintiff's right to due process

18. Policy or practice of failing to discipline resulting in defamation of plaintiff

19. Policy or practice of failing to train resulting in

a conspiracy to deprive plaintiff of his right to equal protection

20. Policy or practice of failing to train resulting in a conspiracy to deprive plaintiff of his right to be free to express himself

21. Policy or practice of failing to train resulting in a conspiracy to deprive plaintiff of his right to life, liberty and property without due process

22. Policy or practice of failing to train resulting in a conspiracy to deprive plaintiff of his right to a fair trial

23. Policy or practice of failing to train resulting in a conspiracy to use excessive force against plaintiff

24. Policy or practice of failing to discipline resulting in a conspiracy to deprive plaintiff of his right to equal protection

25. Policy or practice of failing to discipline resulting in a conspiracy to deprive plaintiff of his right to be free to express himself

26. Policy or practice of failing to discipline resulting in a conspiracy to deprive plaintiff of his right to life, liberty and property without due process

27. Policy or practice of failing to discipline resulting in a conspiracy to deprive plaintiff of his right to a fair trial

28. Policy or practice of failing to discipline resulting in a conspiracy to use excessive force against plaintiff

29. Policy or practice of failing to train deputies from conspiring against citizens prior to trial

30. Policy or practice of failing to discipline deputies for conspiring against citizens prior to trial

31. Negligent hiring

32. Negligent retention

33. Negligent supervision

34. Punitive damages

Defendant City of Roundup:

1. Policy or practice of failing to train resulting in plaintiff's arrest without probable cause

2. Policy or practice of failing to train resulting in unreasonable searches of plaintiff's property

3. Policy or practice of failing to train resulting in unreasonable seizures of plaintiff's property

4. Policy or practice of failing to train resulting in the excessive use of force against plaintiff

5. Policy or practice of failing to train resulting in violation of plaintiff's right to be informed of the charges against him

6. Policy or practice of failing to train resulting in violation of plaintiff's right to be free from cruel and unusual Punishment

7. Policy or practice of failing to train resulting in violation of plaintiff's right to be free from malicious prosecution

8. Policy or practice of failing to train resulting in violation of plaintiff's right to due process

9. Policy or practice of failing to train resulting in defamation of plaintiff

10. Policy or practice of failing to discipline resulting in plaintiff's arrest without probable cause

11. Policy or practice of failing to discipline resulting in unreasonable searches of plaintiff's property

12. Policy or practice of failing to discipline resulting in unreasonable seizures of plaintiff's property

13. Policy or practice of failing to discipline resulting in the excessive use of force against plaintiff

14. Policy or practice of failing to discipline resulting in violation of plaintiff's right to be informed of the charges against him

15. Policy or practice of failing to discipline resulting in violation of plaintiff's right to be free from cruel and unusual punishment

16. Policy or practice of failing to discipline resulting in violation of plaintiff's right to be free from malicious prosecution

17. Policy or practice of failing to discipline resulting in violation of plaintiff's right to due process

18. Policy or practice of failing to discipline resulting in defamation of plaintiff

19. Policy or practice of failing to train resulting in a conspiracy to deprive plaintiff of his right to equal protection

20. Policy or practice of failing to train resulting in a conspiracy to deprive plaintiff of his right to be free to express himself

21. Policy or practice of failing to train resulting in a conspiracy to deprive plaintiff of his right to life, liberty and property without due process

22. Policy or practice of failing to train resulting in a conspiracy to deprive plaintiff of his right to a fair trial

23. Policy or practice of failing to train resulting in a conspiracy to use excessive force against plaintiff

24. Policy or practice of failing to discipline resulting in a conspiracy to deprive plaintiff of his right to equal protection

25. Policy or practice of failing to discipline resulting in a conspiracy to deprive plaintiff of his right to be free to express himself

26. Policy or practice of failing to discipline resulting in a conspiracy to deprive plaintiff of his right to life, liberty and property without due process

27. Policy or practice of failing to discipline

resulting in a conspiracy to deprive plaintiff of his right to a fair trial

28. Policy or practice of failing to discipline resulting in a conspiracy to use excessive force against plaintiff
29. Policy or practice of failing to train deputies from conspiring against citizens prior to trial

30. Policy or practice of failing to discipline deputies for conspiring against citizens prior to trial

31. Negligent hiring

32. Negligent retention

33. Negligent supervision

34. Punitive damages

Defendant G. Paul Smith:

1. Policy or practice of failing to train resulting in plaintiff's arrest without probable cause

2. Policy or practice of failing to train resulting in unreasonable searches of plaintiff's property

3. Policy or practice of failing to train resulting in unreasonable seizures of plaintiff's property

4. Policy or practice of failing to train resulting in the excessive use of force against plaintiff

5. Policy or practice of failing to train resulting in violation of plaintiff's right to be informed of the charges against him

6. Policy or practice of failing to train resulting in violation of plaintiff's right to be free from cruel and unusual punishment

7. Policy or practice of failing to train resulting in violation of plaintiff's right to be free from malicious prosecution

8. Policy or practice of failing to train resulting in violation of plaintiff's right to due process

9. Policy or practice of failing to train resulting in defamation of plaintiff

10. Policy or practice of failing to discipline resulting in plaintiff's arrest without probable cause

11. Policy or practice of failing to discipline resulting in unreasonable searches of plaintiff's property

12. Policy or practice of failing to discipline resulting in unreasonable seizures of

plaintiff's property

13. Policy or practice of failing to discipline resulting in the excessive use of force against plaintiff

14. Policy or practice of failing to discipline resulting in violation of plaintiff's right to be informed of the charges against him

15. Policy or practice of failing to discipline resulting in violation of plaintiff's right to be free from cruel and unusual punishment

16. Policy or practice of failing to discipline resulting in violation of plaintiff's right to be free from malicious prosecution

17. Policy or practice of failing to discipline resulting in violation of plaintiff's right to due process

18. Policy or practice of failing to discipline resulting in defamation of plaintiff

19. Policy or practice of failing to train resulting in a conspiracy to deprive plaintiff of his right to equal protection

20. Policy or practice of failing to train resulting in a conspiracy to deprive plaintiff of his right to

be free to express himself

21. Policy or practice of failing to train resulting in a conspiracy to deprive plaintiff of his right to life, liberty and property without due process

22. Policy or practice of failing to train resulting in a conspiracy to deprive plaintiff of his right to a fair trial

23. Policy or practice of failing to train resulting in a conspiracy to use excessive force against plaintiff

24. Policy or practice of failing to discipline resulting in a conspiracy to deprive plaintiff of his right to equal protection

25. Policy or practice of failing to discipline resulting in a conspiracy to deprive plaintiff of his right to be free to express himself

26. Policy or practice of failing to discipline resulting in a conspiracy to deprive plaintiff of his right to life, liberty and property- without due process

27. Policy or practice of failing to discipline resulting in a conspiracy to deprive plaintiff of his right to a fair trial

28. Policy or practice of failing to discipline resulting in conspiracy to use excessive force against plaintiff

29. Policy or practice of failing to train deputies from conspiring against citizens prior to trial

30. Policy or practice of failing to discipline deputies for conspiring against citizens prior to trial

31. Negligent hiring

32. Negligent retention

33. Negligent supervision

34. Punitive damages

Defendant John Bohlman:

1. Excessive use of force

2. Cruel and unusual punishment

3. Malicious prosecution

4. Violation of plaintiff's right to be informed of charges against him

5. Violation of plaintiff's right to due process

6. Defamation

7. Conspiring to prepare groundless charges against plaintiff

8. Assault

9. Battery

10. False arrest

11. False imprisonment

12. Intentional infliction of emotional distress

13. Outrageous conduct

14. Invasion of privacy

15. Negligence

16. Conversion

17. Loss of consortium

18. Punitive damages

Defendant Deputy Orville "Buzz" Jones:

1. Arrest without probable cause

2. Excessive use of force

3. Cruel and unusual punishment

4. Unreasonable search of property

5. Unreasonable seizure of property

6. Malicious prosecution

7. Violation of plaintiff's right to be informed of charges against him

8. Violation of plaintiff's right to due process

9. Defamation

10. Conspiring to deprive plaintiff of his right to equal protection

11. Conspiring to deprive plaintiff of his right to be free to express himself

12. Conspiring to deprive plaintiff of his right to life, liberty and property without due process

13. Conspiring to deprive plaintiff of his right to a fair trial

14. Conspiring to use excessive force against plaintiff

15. Conspiring to prepare groundless charges against plaintiff

16. Assault

17. Battery

18. False arrest

19. False imprisonment

20. Intentional infliction of emotional distress

21. Outrageous conduct

22. Invasion of privacy

23. Negligence

24. Conversion

25. Loss of consortium

26. Punitive damages

Defendant Deputy "Dutch" Van Svckel:

1. Arrest without probable cause

2. Excessive use of force

3. Cruel and unusual punishment

4. Unreasonable search of property

5. Unreasonable seizure of property

6. Malicious prosecution

7. Violation of plaintiff's right to be informed of charges against him

8. Violation of plaintiff's right to due process

9. Defamation

10. Conspiring to deprive plaintiff of his right to equal protection

11. Conspiring to deprive plaintiff of his right to be free to express himself

12. Conspiring to deprive plaintiff of his right to life, liberty and property without due process

13. Conspiring to deprive plaintiff of his right to a fair trial

14. Conspiring to use excessive force against plaintiff

15. Conspiring to prepare groundless charges against plaintiff

16. Assault

17. Battery

18. False arrest

19. False imprisonment

20. Intentional infliction of emotional distress

21. Outrageous conduct

22. Invasion of privacy

23. Negligence

24. Conversion

25. Loss of consortium

26. Punitive damages

Defendant Deputy Wanda Spaulding

1. Excessive use of force

2. Cruel and unusual punishment

3. Malicious prosecution

4. Violation of plaintiff's right to be informed of

charges against him

5. Violation of plaintiff's right to due process

6. Defamation

7. Conspiring to deprive plaintiff of his right to equal protection

8. Conspiring to deprive plaintiff of his right to be free to express himself

9. Conspiring to deprive plaintiff of his right to life, liberty and property without due process

10. Conspiring to deprive plaintiff of his right to a fair trial

11. Conspiring to use excessive force against plaintiff

12. Assault

13. Battery

14. False arrest

15. False imprisonment

16. Intentional infliction of emotional distress

17. Outrageous conduct

18. Invasion of privacy

19. Negligence

20. Conversion

21. Loss of consortium

22. Punitive damages

Defendant Deputy Woodrow Weitzeil:

1. Excessive use of force

2. Cruel and unusual punishment

3. Malicious prosecution

4. Violation of plaintiff's right to be informed of charges against him

5. Violation of plaintiff's right to due process

6. Defamation

7. Conspiring to deprive plaintiff of his right to equal protection

8. Conspiring to deprive plaintiff of his right to be free to express himself

9. Conspiring to deprive plaintiff of his right to life, liberty and property without due process

10. Conspiring to deprive plaintiff of his right to a fair trial

11. Conspiring to use excessive force against plaintiff

12. Assault

13. Battery

14. False arrest

15. False imprisonment

16. Intentional infliction of emotional distress

17. Outrageous conduct

18. Invasion of privacy

19. Negligence

20. Conversion

21. Loss of consortium

22. Punitive damages

Prior to trial, the Court granted the City of Roundup's motion for summary judgment for the reason that Sheriff Smith was not acting as a policymaker for the City during the incident inquestion. The Court also granted summary judgment to John Bohlman, finding that many of the claims against him were barred by the doctrine of prosecutorial immunity. Those claims against Bohlman that weren't protected by immunity were dismissed due to an utter paucity of facts demonstrating that Bohlman acted either unconstitutionally or tortiously. The Court granted summary judgment to the remaining defendants on the is sues of probable cause to arrest, cruel and unusual punishment, negligent hiring and defamation. The punitive damages claim against Musselshell County was also dismissed.

The remaining six defendants went to trial on March 15, 1999. After seven days, the Court instructed the jury on the issues of excessive use of force, unreasonable search and seizure of property, intentionally or recklessly making false statements in applying for search or arrest warrants, conspiracy, supervisory liability of Sheriff Smith, unconstitutional custom or policy of Musselshell County, assault, battery, intentional infliction of emotional distress, conversion, negligence, and punitive damages.[2] Out of all of these claims, the jury returned a verdict against only one defendant on only one claim, awarding plaintiff a mere $200.

Footnote (2) Any claims not dismissed by summary

judgment or submitted to the jury were dropped by plaintiff's failure to advance them either in the final pretrial order or through proposed jury instructions.

All in all, plaintiff's degree of success pales in comparison to his monumental degree of failure. Plaintiff brought well over 200 claims and prevailed on one.3 In so doing, he consumed the time and resources of the Court, the jury, the defense attorneys, and defendants themselves, some of whom are still public servants.4

Footnote (3) 'Plaintiff states that he has deducted from his computation of hours the time consumed on unsuccessful claims. A review of his time sheets, however, demonstrates that this is a blatant misrepresentation . The time sheets include such items as calls and letters to the attorneys for the City of Roundup and John Bohlman, defendants who were dismissed prior to trial. It is unclear as to which claims other hours in the timesheets relate. For this reason alone, the Court could deny plaintiff's request for fees. See Henslev v. Eckerhart, 461 U.S. 424, 437 (1983) (In order to meet his burden of establishing entitlement to an award of fees, plaintiff "should maintain billing time records that will enable a reviewing court to identify distinct claims . "). In all probability, if plaintiff actually deducted the time spent on unsuccessful issues, he would have no claim for fees at all.

Footnote (4) This is not the only seven-day trial these defendants were fo:rced to sit through. On behalf of other litigants, plaintiff's attorney filed claims against these same defendants in state court. Jame s v. Musselshell County, Montana Fourth Judicial District Court, DV 95-74. Of the six plaintiffs in the James case, only one went to trial. He recovered nothing.

Interestingly enough, plaintiff has not reduced his

claim for fees to reflect time spent in discovery relative to the unsuccessful state court case.

Section 1988 "is a tool that ensures the vindication of important rights, even when large sums of money are not a stake, by making attorney's fees available under a private attorney general theory." Farrar 506 U.S. at 122 (O'Connor, J., concurring) Here, no important rights were vindicated. No future lawless conduct will be deterred. No meaningful purpose was served. To award plaintiff fees under these circumstances would result in a grave injustice to the Court, the defendants and the taxpayers.

The Court has presided over this case from its commencement in July 1997. During this time, the Court has observed the continual maneuvering of plaintiff's attorney, the untenable stands taken, and the sloppy presentation of proof. Time and again, plaintiff insisted on taking specious positions on discovery issues, maintaining that he did not have to provide defendants with materials responsive to requests for production and arguing that defendants should be required to provide him with materials that were not in their custody or control. Plaintiff's counsel even asserted that one of his clients in the companion state court case should be allowed to wear firearms during his deposition, forcing defendants to file a motion for protective order. Not until the motion came on for hearing did plaintiff withdraw his opposition thereto.

Plaintiff's response to dispositive motions was

nothing short of slipshod. His mishmash of supporting documents included illegible and inadmissible hearsay materials, with pages that were either mixed up or missing altogether. His affidavits also lacked certain pages, in addition to containing inadmissible statements not based on personal knowledge. In response to one of defendants' summary judgment motions, he lodged a videotaped deposition without an accompanying transcript and invited the Court to either have the tape transcribed or to review it in its entirety to find evidence to support plaintiff's position. In answer to defendants' motions for summary judgment on the defamation issues, plaintiff filed a one-inch stack of newspaper articles, informing the Court that he simply did not have time to list all of the defamatory statements. Needless to say, the defamation claims were dismissed.

The Court could continue listing the antics of plaintiff's attorney attempting to join the United States on the eve of trial, trying in vain to circumvent the Court's order on expert witnesses, offering an unauthenticated transcript at trial, subpoenaing wiitnesses without providing witness fees.[5] But from these examples, the point has been made.

Footnote (5) Another disturbing example of the out rageous conduct of plaintiff's attorney is demonstrated by his admission that he offered to release an out-of-town witness from a subpeona if the witness would agree to take only half of his witness fee, this after the witness had stood by for several days.

The Court cannot in good conscience reward with fees the very counsel whose time consuming and vexatious litigation tactics failed to advance his case in any degree whatsoever. No public purpose would be advanced by allowing plaintiff to recover his attorney's fee for requiring the Court and the defendants to expend so much for so little. Justice will be served only if the Court totally refuses to award plaintiff his fees.

In accordance with the foregoing findings and conclusions, IT IS ORDERED that plaintiff's motion for attorney fees is denied.

Pursuant to Rule 54 (d) (2) (C), Fed.R.Civ.P., the Clerk of Court shall forthwith enter judgment accordingly. The Clerk of Court shall notify counsel of record of the making of this order.

Done and dated this 26th day of May, 1999.

/s/ Richard W. Anderson
UNITED STATES MAGISTRATE JUDGE